will be offered. The existence of a choice between providing fixed services on either a primary basis or a secondary/incidental basis is neither inconsistent nor contradictory, as argued by commenters.[12] To the contrary, it is the embodiment of the "flexibility" that the Commission was striving to achieve. As CMS explained,[13] when the Commission spoke of the "limitations" imposed by Section 22.323, it was referring to the fact that, prior to adoption of the *R&O* in this proceeding, carriers could only provide fixed services on an "ancillary," "auxiliary," or "incidental" basis.[14] The Commission was not implying that "incidental" provision of service was limiting, but that secondary provision was all that was authorized, and the implications of providing service on a secondary or incidental basis were not always clear to potential providers. The ability to provide fixed services on a co-primary basis is not mutually exclusive with the ability to provide fixed services on an incidental basis. It is purely a new alternative.

CTIA speaks of the "additional regulatory burdens" that Section 22.323 imposes on cellular carriers,[15] and AT&T enumerates some of the reporting requirements associated with choosing to provide fixed services on an incidental basis,[16] while GTE concurs with BellSouth that "it is difficult, if not impossible, to comply with the incidental service rules."[17] RTG points out that, as burdensome as compliance with Section 22.323 may be from an administrative standpoint, it is now

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[12] Comments of AT&T Wireless Services, Inc. ("AT&T") at 1; CTIA Comments at 5; GTE Comments at 3 ("retention of Section 22.323 is both confusing and completely at odds with the FCC's stated intentions with respect to fixed cellular services.").

[13] CMS Comments at 2-3.

[14] *See R&O* at ¶ 8.

[15] CTIA Comments at 5.

[16] AT&T Comments at 2.

[17] GTE Comments at 5.

a choice, not a mandatory condition to the provision of fixed wireless services utilizing CMRS frequencies. The Commission's decision to also authorize the provision of fixed services on a primary basis pursuant to Section 22.901, *et al.*, means that a carrier can choose to provide fixed services on a primary basis and avoid the notification requirements of Section 22.323, or it can choose the benefits of providing incidental service -- chiefly, relief from burdensome state and local rate or entry regulation under Section 332 of the Communications Act of 1934, as amended[18] -- and deal with the administrative aspects of that choice. The burden of complying with the administrative details associated with Section 22.323 cannot be serious justification for possibly eliminating this service option.

The thrust of BellSouth's Petition is that, in light of the changes brought about by the *R&O*, Section 22.323 is no longer useful. This contention, and the contentions of the supporting commenters, is superficial and lacking in its failure to address the significant regulatory distinctions between fixed services provided on an incidental basis pursuant to Section 22.323, and fixed services provided on a co-primary basis pursuant to Section 22.901. Commenters support BellSouth's Petition with discussions of issues such as the ambiguity of the terms "ancillary," "auxiliary," and "incidental,"[19] the administrative burdens associated with complying with Section 22.323,[20] and the competitive state of the CMRS marketplace.[21] The number of potential providers of CMRS is irrelevant to the function of Section 22.323, and the other arguments are purely cosmetic. What BellSouth and its supporters fail to address is the fact that incidental services offered by CMRS

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[18] 47 U.S.C. § 332.

[19] AT&T Comments at 1; CTIA Comments at 3-4; GTE Comments at 2.

[20] *See* notes 13-15 *supra.*

[21] AT&T Comments at 2-3; CTIA Comments at 4; GTE Comments at 4-5.

providers fall within the statutory definition of "mobile services," and are subject to CMRS regulation.[22] As such, they are protected from burdensome state and local rate or entry regulations under Section 332 of the Communications Act. This fact is fundamentally at odds with CTIA's claim that:

> The *Report and Order* reflects a recognition on the part of the Commission that the market is fully capable of ensuring that CMRS spectrum is put to the best, most efficient use, free from unnecessary government oversight.[23]

The issue of whether fixed services offered on a *co-primary* basis are considered to be "mobile services" entitled to Section 332 protections is currently pending before the Commission in the *FNPRM* phase of this proceeding. Accordingly, the only way a CMRS provider can offer fixed services on its CMRS frequencies with the assurance that it will not be subject to state or local regulations is to offer fixed services on an incidental basis pursuant to Section 22.323. Therefore, Section 22.323 is not only useful, it offers a critical protection to CMRS licensees who are contemplating the provision of fixed services over their licensed frequencies.

The arguments of AT&T, CTIA and GTE are misplaced. Section 22.323 and Section 22.901 are not inconsistent or incompatible; they require, at the most, semantic reconciliation. RTG is not opposed to a modification of the wording of Section 22.323 to clarify its application in light of Section 22.901. RTG is strongly opposed, however, to its elimination, unless and until the Commission determines, through the *FNPRM* deliberation on the regulatory treatment of fixed services provided over CMRS spectrum, that such services will be treated as "mobile services" falling under the protection of Section 332.

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[22] *FNPRM* at ¶ 48.

[23] CTIA Comments at 4 (emphasis added).

B. No Sustainable Decision on Whether or Not to Eliminate or Modify Section 22.323 can Result from BellSouth's Petition Because the Issue Involves Substantive Rules that Require Notice and Comment Rulemaking Pursuant to Section 553 of the Administrative Procedure Act

BellSouth's Petition is not the proper vehicle for the consideration of the retention, elimination or modification of Section 22.323 of the Commission's rules. Any actions taken pursuant to the proposals presented in BellSouth's Petition, and supported or opposed in the comments and reply comments filed thereto, would amount to the manipulation of substantive rules that requires a formal period of public notice and comment as accorded by the Administrative Procedure Act ("APA").

The APA requires that the Commission allow an opportunity for notice and comment before promulgating rules other than those of interpretation, general statements of agency policy, or rules of agency organization, procedure, or practice.[24] Section 551(4) of the APA defines a "rule" as "an agency statement of general or particular applicability and future effect designed to implement . . . law or policy . . . ."[25] A substantive rule is one which has a substantial impact on substantive rights and interests.[26] In determining whether a rule effects substantive rights or interests, such that its promulgation would require Section 553 notice and comment rulemaking, a court looks to the

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[24] *See* 5 U.S.C. § 553(b).

[25] 5 U.S.C. § 551(4).

[26] *In re* Applications of Columbia Bible College Broadcasting Co., *Hearing Designation Order*, MM Docket No. 90-607, 6 FCC Rcd 516, 581 (citing *National Association of Home Health Agencies v. Schweiker*, 690 F.2d 932, 949 (D.C. Cir. 1982), cert. denied, 459 U.S. 1205 (1983).

application of the rule to see whether it changes the existing rights and obligations of those to whom it pertains.[27] If the rule will have a substantial impact on affected parties, notice and opportunity for comment by the public should first be provided.[28]

Section 22.323 is a substantive rule that obliges carriers choosing to provide incidental fixed services to meet specific requirements in exchange for the right to provide fixed services free from state local government rate and entry regulations. Any modification or elimination of these obligations and rights will have a significant impact on the substantive rights and interests of telecommunications carriers. Therefore, the public needs to be apprised of any proposals to modify or eliminate Section 22.323 through a Section 553 notice and comment rulemaking proceeding.

BellSouth's Petition is not sufficient notice to the public that Section 22.323 may be modified or eliminated. Only five parties filed comments in response to BellSouth's Petition.[29] RTG submits that this group is not the entire field of entities that would wish to comment on BellSouth's proposals, and argues that the notice provided by the filing of BellSouth's Petition is not adequate to satisfy Section 553 notice and comment requirements. The APA requires the Commission to provide notice of a proposed rulemaking "adequate to afford interested parties a reasonable opportunity to participate in the rulemaking process."[30] Accordingly, if the Commission wishes to

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[27] *See Lewis-Mota v. Secretary of Labor*, 469 F.2d 478, 482 (2nd Cir. 1972).

[28] *Id.*(citing *Pharmaceutical Manufacturers Association v. Finch*, 307 F. Supp. 858, 863 (D.Del. 1970).

[29] Commenting parties include Airtouch Communications, Inc., AT&T Wireless, CMS, CTIA, and GTE.

[30] *MCI v. FCC*, 57 F.3d 1136, 1140 (D.C. Cir. 1995) (citing *Florida Power & Light Co. v. United States*, 846 F. 2d 765, 771 (D.C. Cir. 1988).

eliminate Section 22.323, it must given notice of its proposal in the form of a formal NPRM. Only by issuance of an NPRM will adequate notice be given to all potentially interested parties who might wish to comment.

III. CONCLUSION

For the foregoing reasons, RTG respectfully requests that the Commission retain Section 22.323 and deny BellSouth's Petition. In the alternative, if the Commission determines that BellSouth's proposals merit consideration, RTG requests that it do so through the establishment of a notice of proposed rulemaking. Should a notice and comment rulemaking result in the determination that Section 22.323 and its inherent rights and obligations are eliminated, RTG supports CMS's request[31] that the Commission grandfather the regulatory treatment currently afforded licensees offering incidental fixed services as intended under the *R&O*.[32]

Respectfully submitted,

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[31] CMS Comments at 6, n.8.

[32] *See R&O* at ¶ 4 ("We do not intend to alter the regulatory treatment of licensees offering the ancillary, auxiliary, and incidental fixed services that have been offered by CMRS providers under our rules prior to this order.").

CERTIFICATE OF SERVICE

I, Joy Barksdale, hereby certify that on this 12th day of December, 1997, a copy of the foregoing "Reply Comments of the Rural Telecommunications Group" has been served by first class, United States mail, postage prepaid to the party listed below:

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